IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

INCOME TAX REFERENCE No 140 of 1986

For Approval and Signature:

Hon'ble MR.JUSTICE A.R.DAVE Sd/-
and
Hon'ble MR.JUSTICE D.A.MEHTA Sd/-

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

GLASS LINES EQUIPMENTS CO LTD

Versus

COMMISSIONER OF INCOME-TAX

Appearance:

MR MANISH J.SHAH FOR MR. JP SHAH for Applicant.

MR AKIL QURESHI FOR MR MANISH R BHATT for Respondent.

CORAM : MR.JUSTICE A.R.DAVE
and
MR.JUSTICE D.A.MEHTA

Date of decision: 12/07/2001

ORAL JUDGEMENT

(Per : MR.JUSTICE D.A.MEHTA)

1 The Income-tax Appellate Tribunal, Ahmedabad Bench 'B' has referred the following question for the opinion of this Court in compliance with the direction issued under the provisions of section 256(2) of the Income Tax Act,1961 (hereinafter referred to as 'the Act').

"Whether, on the facts and in the circumstances of the case, the Tribunal was right in law in holding that the expenditure of Rs.1,69,218/was not the part of the actual cost of the plant?"

2 The assessment year involved is 1974-75 and the accounting period is year ended 30/6/1973. The assessee company was incorporated to conduct business of manufacturing of Glass Lined Equipments. During the previous year under consideration the company carried out only fabrication of the factory and it capitalised expenditure to the tune of Rs.10,25,050/-. It appears that this sum also included the amount of expenditure which was incurred in the preceding year viz. year ended 30/6/1972, and therefore, for the year under consideration a sum of Rs.9,89,924/- was sought to be capitalised as being pre-commencement expenditure. The Income Tax Officer, disallowed the sum of Rs.3,45,563/holding that all the expenses cannot be said to have been incurred for the acquisition of plant and machinery and for bringing the fixed assets into working condition.

3 The assessee being aggrieved carried the matter in appeal before the Commissioner of Income Tax (Appeals). During the course of hearing the assessee company filed an affidavit of one Shri Natvarlal Chunilal Choksi, who was Director of the Company and as per the said affidavit the assessee withdrew its claim in relation to six items totalling to Rs.38,349/-. The C.I.T.(Appeals) for the reasons stated in the appellate order dated 15/2/1982 allowed the claim of capitalisation as regards sum of Rs.1,39,995/- while rejecting the claim in respect of balance sum of Rs.1,69,218/-. The Income Tax Appellate Tribunal concurred with the reasons stated by the Commissioner (Appeals) and confirmed the appellate order without recording any independent finding.

4 Mr.Manish J.Shah, learned Advocate appearing on behalf of the applicant assessee challenged the impugned order of the Tribunal on the ground that the Tribunal had not applied its mind to the facts of the case with special reference to the affidavit of the Director and

the written submissions which were filed before the C.I.T.(Appeals). It was submitted that the decision of the Supreme Court in the case of Challapalli Sugars Ltd. vs. Commissioner of Income Tax, A.P. 98 I.T.R.167, had specified that the expression 'actual cost' had to be construed in the sense which no commercial man would misunderstand and for this purpose normal Rules of Accountancy prevailing in commerce and industry had to be borne in mind. It was submitted that all expenditure which was incurred for construction and erection of a plant viz.at the pre commencement stage, had to be capitalised and added to the cost of the fixed assets which would come into existence as a result of such expenditure. It was submitted that the Tribunal had failed to take into consideration the aforesaid salutary principles and hence the order of the Tribunal should not be permitted to hold the field. In support of the aforesaid submission the following decisions of various High Courts were relied upon :

(1) 98 I.T.R. 574 (Bombay) (Commissioner of Income Tax, Bombay City vs. Polychem Ltd.

(2) 129 I.T.R.373 (Delhi) (Commissioner of Income Tax, Delhi vs. J.M.A.Industries Ltd.

(3) 243 I.T.R. 788 (Madras) (Commissioner of Income Tax vs. Standard Polygraph Machines Pvt.Ltd.

Referring to the ratio of the aforesaid decisions it was contended that the test to be applied would be in case a contract was given for setting up the plant on turn key project basis, what would be the expenditure such a contractor would incur, and if the entire expenditure as billed by the contractor was available for the purpose of capitalisation, the assessee who undertakes such setting up on its own on departmental basis should not be denied the same benefit.

5. The order of the Tribunal was assailed from another angle while referring to and relying upon the decision of the Apex Court in the case of Mehta Parikh & Co. vs. Commissioner of Income Tax, Bombay, 30 I.T.R.181. It was contended that as held by the Supreme Court once an affidavit has been filed and the contents of the affidavit have not been disproved by cross examining the deponent, it would not be open to the Revenue Authorities to disregard the averments made in the affidavit. It was further submitted that the Supreme Court was called upon to deal with a situation where an affidavit was filed by the third party but the ratio of

the decision had been applied by the Allahabad High Court in the case of L.Shohan Lal Gupta vs. Commissioner of Income Tax, U.P., Lucknow, 33 I.T.R.786 in a case where the assessee himself had filed an affidavit. Elaborating on this contention our attention was drawn to the affidavit appearing at page 49 of the Paper Book and it was pointed out that the assessee had on its own described six items of expenditure totalling Rs.38,349/- which according to the assessee are not relevant to the setting up of the plant, that this part of the affidavit had been accepted by the C.I.T.(Appeals), and the balance portion of the affidavit had been ignored. Our attention was drawn to para 5 of the affidavit which reads as under :

"5) That all the remaining expenditure is incurred or made for establishment set up and maintained for setting up of the plant at Umreth."

It was submitted that this part of the affidavit having remained uncontroverted, it was not open to the C.I.T.(Appeals) or the Tribunal to take any different view as regards the balance amount of expenditure.

6. Mr.Akil Qureshi, learned Advocate appearing on behalf of the Revenue submitted that out of total expenditure of about Rs. 10 lacs the Income-tax Officer himself had allowed more than 65% of the expenditure and only 35% of the claim was rejected in view of the fact that certain items of expenditure like general expenses, miscellaneous expenses, administrative staff salary etc. could not be said to have been incurred for the purpose of bringing assets in existence and putting them in working condition. That inspite of this position the C.I.T.(Appeals) had after application of mind granted further deduction and the dispute narrowed down to hardly 10% of the total expenditure incurred. It was, therefore, urged that no interference was called for and the Tribunal had correctly concurred with the finding and reasoning of the C.I.T.(Appeals). It was further submitted that the assessee had in its affidavit stated that the amount which was agreed to be disallowed was on the basis of estimate, and therefore, the orders of the authorities below were more than fair and reasonable when some portion of the expenditure was disallowed on an estimated basis. Referring to the order of C.I.T.(Appeals), it was pointed out that the estimate made by the Appellate Authority for the purpose of disallowance was based on evidence eventhough there was

an element of guess work in such estimate as is bound to be , but that should not detract from the position that, the sum ultimately disallowed was just and proper. According to Mr.Qureshi no legal issue was involved and the findings recorded by the C.I.T.(Appeals) which have been confirmed by the Tribunal were based on facts and evidence on record and it was not open to this Court to take any other view of the matter on the basis of these findings.

7. It is true, as contended on behalf of the revenue, that the findings recorded by the C.I.T. (Appeals) and the Tribunal are based on facts and evidence on record, but on close reading of the order of the First Appellate Authority we find that he has misdirected himself in law while taking into consideration the affidavit filed by the Director of the Company. The C.I.T.(Appeals) for the purpose of upholding partial disallowance has relied upon one portion of the affidavit viz. where the assessee company has through its Director offered Rs.38,349/- for disallowance. As regards the balance portion the affidavit is categorical in terms and as can be seen from the extract reproduced hereinbefore, the assessee company has made a positive averment to the effect that all other items of expenditure are allowable, i.e. all other items of expenditure are relatable to setting up the plant and bringing fixed assets into existence and putting them into working condition. In none of the appellate orders, viz., those of the C.I.T.(Appeals) and the Tribunal we find any discussion in relation to this part of the affidavit. In fact, the order of the Tribunal is absolutely silent as regards the affidavit and there is no indication whatsoever in the order as to whether the Tribunal was even aware about the existence of the affidavit which was on record.

8. As laid down by the Supreme Court in the case of Mehta, Parikh & Co. (Supra) none of the authorities considered it necessary to cross examine the deponent with reference to the statement made in the affidavit, and hence, under these circumstances it was not open to the revenue to challenge the correctness of the statement made by the deponent in the affidavit. In other words, consequently, the assessee was entitled to assume that the authorities were satisfied with the affidavit as sufficient proof on this point. In the present case, we find that C.I.T. (Appeals) while dealing with the affidavit has conveniently chosen to accept only one part of the statement which was in favour of the revenue and against the assessee while ignoring the rest of the

portion wherein specific averments were made in relation to the balance items of expenditure.

9. In view of the settled legal position, it was not open to either C.I.T. (Appeals) or Tribunal to ignore a part of the contents of the affidavit. We are conscious of the fact that the findings recorded by the C.I.T.(Appeals) and the Tribunal are concurrent as regards the facts and evidence on record and but for the averments made in the affidavit which have been ignored, we would not have interfered with the said findings. It is well settled cannon of interpretation that a document has to be read as a whole : it is not permissible to accept a part and ignore the rest of the document.

10. Out of the total expenditure incurred by the assessee company there is one item of depreciation amounting to Rs.53,957/- which would stand on a different footing as against the remaining items. In relation to this, the Tribunal has held that depreciation cannot be allowed to be capitalised as it does not represent an expenditure incurred towards installation of assets whether directly or indirectly. It is further held that depreciation being notional allowance towards wear and tear of capital assets it is treated as deductible item on revenue account to be set off against revenue receipts for the purpose of ascertaining the real income chargeable to tax. According to the Tribunal, it would not be open to the assessee to claim deduction in relation to the depreciation for the purpose of setting off against its revenue receipt and at the same time seek capitalisation of the same by treating the said item as relatable to a period prior to commencement.

11 There cannot be any dispute as regards the principle laid down by the Tribunal that assessee cannot claim benefit twice in relation to the item of depreciation , once on revenue account and again by seeking capitalisation of the same. However, from the facts available on record it is not possible to state with certainty that the assessee has in fact claimed double benefit as apprehended by the Tribunal. In fact, the learned Counsel appearing for both the sides are not in a position to inform or state as to whether in fact the assessee had claimed deduction against its revenue receipt on the one hand and again capitalised the said item for the purpose of claiming depreciation and development rebate. In view of these circumstances, in so far as the item as regards depreciation is concerned, we direct the Tribunal to adjust its decision after

ascertaining factual position. In the event of the assessee having not claimed amount of depreciation relatable to assets of the office on revenue account the assessee may be permitted to capitalise the same.

12. We, therefore, hold that in the circumstances of the case the Tribunal was not justified in law in holding that expenditure, except as regards the item of depreciation was not part of actual cost of the plant. In the result, the question referred to us is answered in the negative, subject to our direction in relation to item of depreciation i.e. in favour of the assessee and against the revenue with no order as to costs.

Sd/- Sd/-
(A.R.Dave, J) (D.A.Mehta, J)

m.m.bhatt